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A-449-804

1st Review

POR: 1/30/01 - 8/31/02

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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration, Group II

DATE: December 15, 2003

SUBJECT: Issues and Decision Memorandum for the Final Results of the First
Administrative Review of Certain Steel Concrete Reinforcing Bars from
Latvia

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the first administrative review of certain steel concrete reinforcing bars (rebar) from Latvia. As a result of our analysis, we have made one change in the margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this review for which we have received comments from the parties:

Comment 1: The Use of Adverse Facts Available or an Alternative Neutral Facts Available in the Final Results

Comment 2: Ministerial Error

Background

On August 15, 2003, the Department of Commerce (the Department) published the preliminary results of the first administrative review of rebar from Latvia. The period of review (POR) is January 30, 2001, through August 31, 2002. We invited parties to comment on the preliminary results. The

petitioner¹ and respondent, Joint Stock Company Liepajas Metalurgs (Liepajas Metalurgs), in this case submitted case and rebuttal briefs.

Discussion of the Issues

Comment 1: The Use of Facts Available or an Alternative Neutral Facts Available in the Final Results

In its case brief, the petitioner argues that the Department should apply adverse facts available to Liepajas Metalurgs' home market sales made through its affiliate, Armaturas Servisa Centrs (ASC). The petitioner contends that the respondent did not act to the best of its ability when reporting these sales because (1) Liepajas Metalurgs reported sales with incomplete product characteristics and (2) failed to report certain sales that were produced by Liepajas Metalurgs and commingled with merchandise purchased from other suppliers. The petitioner notes that the Department determined in the preliminary results that Liepajas Metalurgs acted to the best of its ability, but argues that the Department should reconsider its decision because "there is no question that Liepajas Metalurgs was aware of the Department's reporting requirements with regard to sales through affiliated parties long before it opened ASC." The petitioner notes further that the Department applied adverse facts available as a result of Liepajas Metalurgs' failure to properly report downstream U.S. sales through an affiliated company in the less-than-fair-value (LTFV) investigation of this case. Therefore, the petitioner affirms that Liepajas Metalurgs had known of the Department's downstream reporting requirements since December 2000. The petitioner also argues that, prior to ASC's opening, Liepajas Metalurgs had experience making sales through its Riga sales office (RSO) and that the Department's verification report did not indicate any reporting problems with those sales, even though they were at the same level of trade as sales through ASC. Finally, the petitioner contends that Liepajas Metalurgs had incentive to establish ASC with an incomplete record-keeping system. According to the petitioner, Liepajas Metalurgs was aware of the price differences between its direct sales and sales made by ASC and realized that a failure to report all information regarding ASC's sales "would prevent high-priced transactions from boosting normal values used for matching."²

For reasons discussed above, the petitioner maintains that Liepajas Metalurgs did not act to the best of its ability with respect to reporting downstream sales made by ASC. Consequently, according to the petitioner, the Department should make an adverse inference in accordance with section 776(b) of the Tariff Act of 1930, as amended (the Act). The petitioner suggests that the Department assume that the U.S. sales that did not have an identical match would have matched to downstream sales made by ASC. As adverse facts available, the petitioner proposes that the Department assign the highest margin calculated for any U.S. sale to those U.S. sales with no identical matches. Alternatively, the petitioner suggests that the Department compare the prices of the U.S. sales without an identical match to the highest normal value calculated for any home market sale.

¹ The petitioner in this proceeding is the Rebar Trade Action Coalition (RTAC).

² See the petitioner's case brief at 1-5.

Barring an adverse facts available decision, the petitioner argues that, at a minimum, the Department should make a neutral facts available decision based on Liepajas Metalurgs' data that does not benefit Liepajas Metalurgs. The petitioner argues that the Department's preliminary decision to match the U.S. sales for which there were no identical matches in the home market to constructed value (CV) is not neutral since it results in zero margins for those comparisons thereby reducing Liepajas Metalurgs' overall margin. Moreover, the petitioner argues that the use of CV assumes that the U.S. sales in question would not have found matches had all of Liepajas Metalurgs' sales been reported correctly. The petitioner contends that, given that the "vast majority" of Liepajas Metalurgs' U.S. sales found identical matches, it is "unreasonable to make such an assumption." Instead, according to the petitioner, the Department should assume that the sales in question would find an identical match. Therefore, "because there is no way to determine whether the price of the above-cost match would be based on direct Liepajas Metalurgs sales or ASC sales," the Department should calculate, as neutral facts available, the average percentage margin for Liepajas Metalurgs' U.S. sales based on all U.S. sales with positive margins and assign that average to the sales with no identical match.³

In its rebuttal brief, Liepajas Metalurgs contends that it acted to the best of its ability in reporting ASC's downstream sales in the home market and answered all of the Department's supplemental questions regarding the issue. Moreover, Liepajas Metalurgs argues that the Department verified that ASC's record keeping did not track the product information at the level of detail necessary to satisfy the Department's reporting requirements for certain sales.⁴ Liepajas Metalurgs contends that the Department's use of neutral facts available was in accordance with the facts of this case. Moreover, citing section 776(b) of the Act and Ferro Union, Inc. v. United States, 74 F. Supp. 2d 1289, 1291 (1999), Liepajas Metalurgs argues that it is inappropriate for the Department to use an adverse inference unless the Department determines that Liepajas Metalurgs failed to cooperate or act in the best of its ability to comply with requests for information.⁵ While Liepajas Metalurgs acknowledges that application of facts available is warranted when there is a failure to provide complete information, it argues, citing American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003 (2000), that such failure "alone is an inadequate justification for making an adverse inference."

Liepajas Metalurgs states that its home market sales were not viable in the LTFV investigation and the Department relied on third-country sales to calculate normal value. Therefore, according to Liepajas Metalurgs, since this is the first time the company has reported home market sales, it was not aware of the scrutiny to which ASC's record-keeping system would be subjected. Nevertheless, Liepajas Metalurgs maintains that, where possible, it properly reported its downstream sales made through

³ See id. at 6.

⁴ See Liepajas Metalurgs' rebuttal brief at pages 2-3; see also Memorandum from Daniel O'Brien and Jim Kemp, International Trade Compliance Analysts, to Gary Taverman, Director, Office 5, Re: Verification of the Sales and Cost Responses of Joint Stock Company Liepaja Metalurgs in the First Administrative Review of Steel Concrete Reinforcing Bars from Latvia, dated July 30, 2003, at pages 10-13.

⁵ See id. at 2.

ASC, but ASC's record-keeping system did not track data at the level of detail required to fully report all the information requested by the Department. Liepajas Metalurgs contends that it was aware of its reporting requirements, and reported all sales "as permitted by ASC's sales and accounting records."⁶ However, Liepajas Metalurgs argues that when ASC was created in the last four months of the POR, Liepajas Metalurgs could not have been aware that ASC's system would not be able to provide all the information requested by the Department.

In response to the petitioner's assertion that Liepajas Metalurgs established ASC with limited sales and accounting systems in order to hide high home market prices, Liepajas Metalurgs argues that the prices were higher simply because they were made at a different level of trade. Liepajas Metalurgs states that ASC's sales and RSO's sales were at the same level of trade and had similar pricing. Accordingly, Liepajas Metalurgs argues that if it had attempted to deceive the Department, similar problems would have been found during the verification of RSO's sales.

Finally, Liepajas Metalurgs argues that the petitioner's suggested neutral facts available methodology would not be neutral but adverse. According to Liepajas Metalurgs, the petitioner's suggestion for neutral facts available assumes that Liepajas Metalurgs is dumping on "many" transactions when the preliminary results indicate that this is not the case. Liepajas Metalurgs notes that when price comparisons cannot be made, the Department is directed by the statute to make comparisons based on CV. Moreover, citing sections 776(c) and 782(c) of the Act, Liepajas Metalurgs asserts that the methodology used in the preliminary results was fair because the Department used verified information submitted by Liepajas Metalurgs and compared U.S. price with normal value based on the CV of the merchandise in question.⁷ Liepajas Metalurgs cites Krupp Thyssen Nirosta GMBH v. United States, 2000 Ct. Intl. Trade Lexis 91, Slip Op. 2000-89 at 18 (July 31, 2000) (Krupp) in arguing that the use of verified information as facts available is appropriate. Moreover, in citing Rhone Poulenc, Inc. v. United States, 899 F. Supp. 2d 1185, 1191 (Fed. Cir. 1990) (Rhone Poulenc) and Peer Bearing Company v. United States, 182 F. Supp. 2d 1285, (Fed. Cir. 2001), Liepajas Metalurgs argues that "use of verified data as facts available furthers the Department's statutory purpose of achieving as accurate margins as possible."

Liepajas Metalurgs notes that the use of CV is not normally beneficial to respondents, and usually leads to high dumping margins, but in this case the application of CV yielded no dumping margins because, Liepajas Metalurgs argues, it was not dumping during the POR.⁸

Department's Position: With regard to the application of adverse facts available, we disagree with the petitioner. In the preliminary results, in accordance with section 776 of the Act, we determined that it would not be appropriate to use adverse facts available with regard to Liepajas Metalurgs' U.S. sales

⁶ See id. at 7.

⁷ See id. at 9-10.

⁸ See id. at 10.

that did not have identical matches in the home market because Liepajas Metalurgs acted to the best of its ability in reporting sales made by ASC. We maintain our determination for the final results; information collected at verification indicates that Liepajas Metalurgs acted to the best of its ability in reporting ASC's sales. We find that, as a new company, ASC did not have the proper record-keeping system in place to meet the Department's reporting requirements. Moreover, in its December 16, 2002, Section B response, Liepajas Metalurgs explained that ASC had some sales for which it did not track the necessary product information. Thereafter, the company answered all the Department's supplemental questions on this issue. At verification, we confirmed the information contained in Liepajas Metalurgs' responses regarding the sales with incomplete product information. Therefore, the application of adverse facts available to sales with no identical matches is not warranted. Moreover, we expect that in future reviews ASC will have had sufficient time to establish its record keeping procedures in full awareness of the Department's reporting requirements. Thus, the Department will expect the company to properly report the source and matching characteristics for all of its home market sales and failure to do so may result in an adverse inference in the application of facts available.

For the final results, we have determined that the continued use of non-adverse facts available is called for but it would be more appropriate to match the U.S. sales that do not have identical matches in the home market to similar home market sales as opposed to CV. By doing so, we follow the Department's normal product matching hierarchy. See, section 771(16) of the Act. Matching to CV is normally relied on only when price-to-price comparisons, whether of identical or similar sales, cannot be made. Since the U.S. sales in question do not match to identical sales in the home market, a neutral result can be achieved by relying on verified sales reported by the respondent.

As Liepajas Metalurgs correctly notes, the Department is directed by the statute to rely on comparisons to CV when price-to-price comparisons cannot be made. Moreover, the Department verified Liepajas Metalurgs' cost data and found it reliable. However, in this case we have verified similar sales which allow price-to-price comparisons to be made, precluding the necessity of relying on CV.

In Krupp, the Court of International Trade (CIT) ruled that the Department should use the respondent's cost database even though one field in the database was found to have errors, provided that the remainder of the cost database was reliable and verifiable. In this case, we are not dismissing Liepajas Metalurgs' home market sales database because part of it was found to be incomplete. Instead, we are relying on the verified elements of the database and matching the U.S. sales that do not have identical matches to similar home market sales. In Rhone Poulenc, the Federal Circuit noted that "the implementing regulations allow the ITA to take into account an importer's deficient response in determining what is 'best information'" and that "the basic purpose of the statute (is) determining current margins as accurately as possible." Again, in this case we are taking into account Liepajas Metalurgs' response by matching the U.S. sales in question to home market sales of similar merchandise.

The petitioner asserts that we should calculate an average of all positive margins and apply the average to the U.S. sales in question. We disagree with the petitioner and agree with Liepajas Metalurgs. Such

an approach would constitute an unwarranted adverse inference because Liepajas Metalurgs cooperated to the best of its ability in this segment of the proceeding.

Comment 2: Ministerial Error

In its case brief, Liepajas Metalurgs claims that the Department erroneously calculated U.S. prices in the preliminary results by using gross unit price calculated on the basis of theoretical weight rather than actual weight. Liepajas Metalurgs argues that the Department should calculate the export price of all U.S. sales using the gross unit price based on actual weight as reported in its U.S. sales database.⁹

In its rebuttal brief, the petitioner argues that the Department properly compared actual U.S. prices to actual normal values by using the actual U.S. gross unit price and actual U.S. quantity in the preliminary margin calculation.¹⁰

Department's Position: We agree with the petitioner. In the preliminary margin calculation, we used actual gross unit price and actual weight. See lines 1267 and 1268 of the preliminary margin calculation program where the U.S. gross unit price and U.S. quantity macro variables are set up to use Liepajas Metalurgs' actual quantity (ACTQTYU) and actual gross unit price (AGRSUPRU). Therefore, no adjustment to the margin calculation is necessary.

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the *Federal Register*.

Agree_____

Disagree_____

Let's Discuss_____

James J. Jochum
Assistant Secretary
for Import Administration

Date

⁹ See Liepajas Metalurgs' case brief at 1-3.

¹⁰ See the petitioner's rebuttal brief at 1-2.